IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 04-10-2007

CORAM

THE HONOURABLE MR.JUSTICE S.PALANIVELU

CRIMINAL ORIGINAL PETITION No.17967 OF 2007

Shi Yang @ Sunny ... Petitioner

-vs-

A.Kannagi ... Respondent

Petition under Section 482 of the Code of Criminal Procedure.

For petitioner : Mr.K.Kumar,
Senior Counsel,
for M/s.Anand, Abdul & Vonodh Associates.

For respondent : Ms.R.Suvithra

O R D E R

This petition has been filed to call for the records pertaining to C.C.No.381 of 2006, pending on the file of Judicial Magistrate No.V, Salem, against the petitioner and to quash the same.

2. Respondent is the complainant. She preferred a complaint under Section 200 Cr.P.C. before the said Court against one Mr.Wang and Mr.Charles, General Managers of the company, by name, M/s.Tianjin Tianshi (India) Pvt.Ltd., having its office at Chennai.

3. The allegations in the complaint go the effect that the company is engaged in marketing of food supplement and cosmetic products and selling them through the members, appointed for the purpose. The complainant is a four star level member in the company. Both the accused asked the complainant to become a franchisee for Salem region to stock and sell their products, for which she was also promised glorious growth and induced to part with a sum of Rs.1,53,000/- by means of demand drafts. She also fulfilled the requirements to become a franchisee, including that of arranging premises to an extent of 200 sq.ft. to stock and sell

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their products. However, the accused did not take any steps to open the branch at Salem and, hence, the complainant was demanding them to open the branch, but in vain. She also issued notices to them on three occasions. But, no reply was forthcoming. Silence on the part of the accused prompted the complainant to prefer a private complaint against them.

4. First accused, after receiving summons, appeared before the Court, but, the second accused failed to appear for the hearings. It was learnt by the complainant that the second accused, by name, Charles quit office and, in his place, the petitioner was posted and, presently, she is attending to all the affairs of the company as General Manager. The fact of the petitioner holding the post of General Manager transpired from an occasion when she approached the complainant in the capacity of General Manager along with a demand draft for a sum of Rs.1,53,000/-, requesting her to come to a compromise, during the pendency of C.C.No.381 of 2006.

5. It is pertinent to note that there is nothing on record to show that the petitioner is the successor in the office of second accused and that she could also be held responsible for the affairs of the company, which were dealt with by the second accused.

6. The bottomline contention of Mr.K.Kumar, learned Senior Counsel for the petitioner, is that without impleading the petitioner in the proceedings and in the absence of any notice from the Court, there is no legal basis to issue summons to her, which is an abuse of process, and that the service of summons to the petitioner is alien to criminal law.

7. Admittedly, there was no petition for impleading the petitioner in the proceedings nor was there any notice from the Court before issuing summons. It appears that since the second accused did not appear before the Court, on a oral enquiry with the complainant, the Judicial Magistrate No.V, Salem, issued summons to the petitioner, as if she is the accused in the case. However, learned counsel for the respondent justifies the said attitude of the Court, while it is assailed by the petitioner.

8. The issue in question has to be decided following the well settled judicial pronouncements on the subject.

9. Ms.R.Suvithra, learned counsel for the respondent, contends that the Judicial Magistrate is well authorised by the procedures of law to issue process to a person, whether named in the charge sheet or not, and that the petitioner, in the capacity of General Manager, being a responsible official of the company,

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issuance of summons to her is well within the powers exercisable by a Judicial Magistrate.

10. In support of her contention, the learned counsel garners support from a decision of the Hon'ble Supreme Court in M/s.SWIL Ltd. v. State of Delhi, AIR 2001 SUPREME COURT 2747, in which it is held as follows :

> "Person not joined as accused in the charge-sheet submitted by the Police, but his name was shown in column No.2, which is meant for the accused who are not sent for the trial, such a person can be summoned as an accused by Magistrate at stage of taking cognizance of offence. The question of there being additional evidence under S.319 Cr.P.C. does not arise."

11. The learned counsel also places reliance upon a decision of the Karnataka High Court in M/s.Prudential Engineers/Builders and Developers v. Kuskoor Bharath Ram, 2004 CRI.L.J.672, wherein, the order taking cognizance and issuing process against all the partners of the firm was held to be proper and that the proceedings initiated against the accused could not be quashed by High Court, in exercise of its inherent powers, as no such case was made out for that.

12. The said decision was rendered, while dealing with a matter under Section 141 of The Negotiable Instruments Act, which dealt with a circumstance that if the person committed offence under Section 138 is a company, every person, who, at the time of commission of offence, was in-charge of and responsible for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded and punished accordingly.

13. The language of the Section would clearly indicate that the person should be in-charge of the affairs of the company at the time of commission of offence, however, the company is always liable for the guilt.

14. Concedingly, the petitioner was not at all in-charge of the post of General Manager at the time of alleged transaction. Merely because she held the post after Charles, by no stretch of imagination, it could be said that the petitioner is also liable and that she should be deemed to have involved in the offence.

15. Mr.K.Kumar, learned Senior Counsel for the petitioner, draws attention of this Court to a decision of a Constitution Bench of the Hon'ble Apex Court in Standard Chartered

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Bank v. Directorate of Enforcement, AIR 2005 SUPREME COURT 2622, in which, a majority view has been rendered in the following lines :

> "There is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. As the company cannot be sentenced to imprisonment, the Court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment, the Court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section viz., S.56 of Foreign Exchange Regulation Act (1973) (FERA) and Ss.276-C and 278-B of Income-tax Act (1961) so far as the juristic person is concerned. Of course, the Court cannot exercise the same discretion as regards a natural person. As regards the company, the Court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the Legislature. It can not be said that, there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy."

16. As per the ruling of the Hon'ble Supreme Court, a corporate body cannot be sentenced to imprisonment, but fine could be imposed, as it is a juristic person. In the case on hand, the company is not on the array of the accused. Both the accused have been arraigned in their official capacities alone and they have not been portrayed as representing the company.

17. The Apex Court, in the above said decision, also observed that legislative intent to prosecute the corporate bodies

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for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted and that it is sheer violence to commonsense that the Legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.

18. The learned Senior Counsel also cites a Full Bench decision of the Hon'ble Supreme Court in S.M.S.Pharmaceuticals Ltd. v. Neeta Bhalla and Another, JT 2005 (8) SC 450, in which a law has been formulated as under :

> "20. In view of the above discussion, our answers to the questions posed in the references are as under :
>
> (a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.
>
> (b) The answer to question posed in sub-para (b) has to be in negative. Merely being a Director of a company is not sufficient to make the person liable under Section 141 of the Act. A Director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.
>
> (c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the

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> office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of the business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141."

19. If any guilt is alleged against a person, necessary averments should be incorporated in the complaint. The functions of the particular accused person should be spelled out in the complaint and the complaint be accurate and unequivocal, pointing out the criminality of the accused person. Those allegations must be made so as to satisfy the Judicial Magistrate, who is to take cognizance.

20. In order to fasten liability, the averments under presumptions or guesswork shall not be permitted. The person, who is reported to have cheated the complainant, should have personally persuaded the complainant with an intention to cheat. The most important factor is that at the time of commission of offence, the said person should be in-charge of and responsible for the affairs of the company, which are essential, touching the transaction entered into by the complainant. Since the cardinal principle of law requires the complaint to contain relevant allegations, the one, which is devoid of those allegations, could not be legally supported. Once the complainant deviates from the legal liability of incorporating necessary contents in the complaint as to the role played by the accused, no cognizance could be taken and issuance of summons could not at all be recognised. Every care must be taken by the complainant in drafting or framing the complaint while any person is included in it, in his official capacity, since the concept of vicarious liability departs from the rule in criminal law.

21. It is well settled that even though it is pleaded in the complaint that a particular individual is a Director of the company, it will not clothe him of any criminal responsibility, but, there must be a specific wording to the effect that he personally persuaded the complainant to part with the amount and that he committed criminal breach of trust.

22. Following the principles laid down in the decisions of the Hon'ble Apex Court in S.M.S.Pharmaceuticals case, it must be held herein that the complaint is non-est, as far as the petitioner is concerned.

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23. Therefore, in the absence of any allegations in the complaint as against the petitioner, issuance of summons to him cannot be acceded to. As such, quashment of the proceedings in C.C.No.381 of 2006 in respect of the petitioner has become indispensable. Accordingly, this petition is allowed. Consequently, the connected Criminal M.P.Nos.1 and 3 of 2007 are closed.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

dixit

To

1. The Judicial Magistrate No.V, Salem.

2. do thro the Chief Judicial Magistrate, Salem.

3. The Inspector of Police, Ammapettai Police Station, Ammapettai.

4. The Public Prosecutor
High Court, Madras.

1 cc to M/s. Anand Abdul & vinodh, Associates, SR. 61733
1 ccs to mr.M. Varatharajan, Advocate, SR. 61539

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